111-609

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 338.

THOMAS J. CARVER, APPELLANT,

vs

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Filed October 8, 1881.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM 1871.

No. 338.

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1 In the Court of Claims.—December Term, 1871.

THOMAS J. CARVER
vs.
THE UNITED STATES. } No. 6395.

I. *Petition—Filed December* 15, 1871.

To the Honorable the Judges of the Court of Claims:

The petition of Thomas J. Carver, a citizen of the United States, resident at Mobile, in the State of Alabama, respectfully showeth:

That your petitioner has at all times borne true faith and allegiance to the United States, and has never given any aid or comfort to rebellion against the same, or to the persons engaged therein, but has at all times consistently adhered to the United States.

Your petitioner further shows, that at the times and dates hereinafter mentioned, your petitioner was not in the military service of the United States, nor a contractor for military arms or supplies, nor in any other manner lawfully subject to military authority or rules or proceedings in any manner whatever. But that in the month of October, anno Domini 1865, he was a citizen in civil life in the pursuit of his lawful business and occupation. And while so engaged, he was, on or about the 4th day of October, A. D. 1865, in a time of peace, arrested by order of one General Chas. R.

2 Wood, of the army of the United States, and was arraigned before a military commission or court martial, convened at the city of Mobile, in the State of Alabama, upon certain false and feigned charges and specifications preferred against him; and afterwards, the said commission or court martial found your petitioner guilty of the said false and feigned charges and specifications, or some of them. And thereupon on the 30th day of October, A. D. one thousand eight hundred and sixty-five, adjudged that "he be fined in the sum of ninety thousand dollars ($90,000) to be paid into the treasury of the United States, and that he further be confined at hard labor in such penitentiary as the commanding general may direct for the term of one year, and until such fine of ninety thousand dollars ($90,000) shall be paid." Your petitioner here shows to the honorable court that the pretended proceedings, findings and sentence of said military commission in the premises, were and are, wholly unauthorized, illegal and void. But that in consequence and pursuance of such illegal and void proceedings, findings and sentence, your petitioner was then and there held in custody, confinement and imprisonment until he paid said illegal, void and oppressive fine of ninety thousand dollars; and that the said sum was paid to the military authorities of the United States, and by them paid over to Francis E. Spinner, Special Agent of the United States, and afterwards, to wit, on the 30th day of March, A. D. 1868, was by him paid over and covered into the Treasury of the United States, where the same now remains.

And by reason of the premises, an action as upon implied promises and contracts has accrued to your petitioner, as and for so much money had and received by the United States, to the use, benefit and behoof of this petitioner; and upon such implied promise and contract he brings this action and prays the judgment of this
3 honorable court, that he recover of and from the United States the said sum of ninety thousand dollars.

THOMAS J. CARVER,
By his attorney in fact, B. D. WHITNEY.

DISTRICT OF COLUMBIA, *ss:*

Benjamin D. Whitney, attorney in fact for said Thomas J. Carver being duly sworn, deposes and says: that the said Thomas J. Carver is the claimant named in the foregoing petition; that no assignment or transfer of said claim or any part thereof, or any interest therein has been made; that the said Thomas J. Carver is justly entitled to the amount as above claimed from the United States, after allowing all just credits and offsets; and that the facts stated in the foregoing petition are true according to the best of his knowledge, information and belief.

THOMAS J. CARVER,
By his attorney in fact, BENJ. D. WHITNEY.

Sworn to and subscribed before me, this 13th day of December, A. D. 1871.

[SEAL.]

EDM. F. BROWN,
Commissioner of the Court of Claims.

Claimant's address:
THOMAS J. CARVER,
Mobile, Ala.

Counsels' address:
BARTLEY & CASEY, and
O. S. LOVELL,
Washington, D. C.

4 II. *Plea of limitation filed Dec.* 19, 1871.

Now come the defendants by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

WILLIAM McMICHAEL,
Ass't Att'y-General.

5 III. *Motion to dismiss petition filed January* 22, 1872.

The defendants, by their Attorney General, come and move the court, to dismiss the petition filed herein, for the reason that the said petition is signed and the affidavit thereto made by one Ben-

jamin D. Whitney, and there has not been filed with the said petition any warrant of attorney executed by the claimant to the said Whitney.

WILLIAM McMICHAEL,
Ass't. Att'y General.

6 IV. *Traverse filed February* 13, 1872.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of ninety thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily
7 aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

WILLIAM McMICHAEL,
Asst. Att'y General.

V *Order overruling motion to dismiss petition.*

At a Court of Claims held in the city of Washington on the 11th day of March, 1872, the motion herein to dismiss petition filed by the Assistant Attorney General was overruled.

8 VI. *Findings of fact and conclusion of law, filed by the court, May* 20, 1881, *in the cases of Thomas J. Carver vs. The United States, numbered* 3612 *and* 6395.

These cases having been heard and submitted together, the court, upon the evidence, finds the facts to be as follows, and directs these findings to be filed as a finding of facts in each case :

I.

On the 14th August, 1865, the President instructed Major-General Thomas, commanding the military division in which the tranactions heinafter described took place, as follows :

WASHINGTON, *August* 14th, 1865.

To Maj. Gen'l THOMAS, *Nashville.*

I have been advised that innumerable frauds are being practiced by persons assuming to be Treasury agents in various portions of

Alabama in the collecting of cotton, pretended to belong to the Confederate government. I also understand that they are connected with the commander of post of Montgomery. I hope you will appoint some efficient officer under your command to proceed and examine and ascertain the facts, and if any parties shall be found, whether connected with the Treasury or military, that you will deal with them in the most summary manner, and report the names of persons engaged in each transaction and each case.

II.

In August, 1865, one Duff C. Greene held the position of local agent to collect cotton formerly sold by planters to the Confederate States for the United States in Choctaw and other counties in Alabama, under appointment of T. C. A. Dexter, supervising special agent of the Treasury Department for the ninth agency, with authority to appoint sub-agents in the several counties of his district.

In October, 1865, the claimant, a citizen of the United States, was, and had for many years been, resident at Mobile, in the State of Alabama.

III.

About July 1, 1865, Greene appointed the claimant a sub-agent under him for collecting said cotton in Choctaw County, and also one Israel Pickens, a resident of said county. Carver and Pickens at once proceeded to collect the cotton, contracting with the planters in whose possession it was, to put it in order and haul it to Tuscahoma and Thomkin's Bluff, on the Tombigbee River. In the latter part of July one Myer, a relative of Carver, was stationed at Tuscahoma, and received the cotton so brought there.

9 IV.

On the 5th August, 1865, a change was made, under instructions of the Secretary of the Treasury, in the mode of collecting such cotton, in accordance with which the authority of said Green and his said sub-agents terminated on that date. By the change the collection was required to be made by a bonded officer of the department, and on August 29th the claimant was appointed such officer for the collection of government cotton in Choctaw county by said Dexter, gave the required bond, and entered upon the discharge of the duties of the office.

September 6th Carver appointed said Pickens and Myer agents under him for collecting cotton in said county.

V.

For a short time, under the first employment of these three

parties, they made arrangements with the planters to put the cotton in order and haul it to a shipping point on the river at rates varying from $1.50 to $5 per bale; but, in order to get possession of the cotton more rapidly, they proceeded to bargain with various planters, and to pay them from $40 to $50 per bale for their cotton delivered as aforesaid. These payments were not made from the defendants' funds or on defendants' account, but were from funds supplied by Carver, with the intent of appropriating the cotton to his own use. About 600 bales of cotton were collected and appropriated by him, for which he paid the planters upwards of $25,000, and none of it was ever turned over to or received by the defendants.

VI.

About September 16 the claimant was superseded in said office, and on September 23, 1865, at Mobile, he was arrested by military authority, and on October 4, 1865, an order was issued by the commanding general of the Military Department of Alabama, of which the following is an extract:

HEADQUARTERS DEP'T OF ALABAMA,
Mobile, Ala., October 4, 1865.

[Special Orders No. 68.—Extract.]

I. A military commission is ordered to convene at the office of Brevet Lieut. Col. Hunter Brooke, judge-advocate-general Department Alabama (corner Royal and St. Michael streets, Mobile), at 10 a. m., the 5th instant, for the trial of Thomas J. Carver (citizen) and such other prisoners as may be properly brought before it.

Detail for the commission.

Brig. Gen. W. B. Woods, chief of staff, Department Alabama.
Major John D. Wilkins, 15th U. S. Infantry.
Major Henry McGonigle, 21st Missouri Infantry.
Captain C. W. Morgan, ad't'l A. D. C.
Captain J. W. Davis, 21st Missouri Infantry.
Brevet Lieut. Col. Hunter Brooke, judge-advocate-general Department Alabama, will act as judge-advocate of the commission.
No other officers than those named can be assembled without manifest injury to the service.

* * * * * * * *

By order of Maj. General Chas. R. Woods:

FRED. H. WILSON, *A. A. G.*

10 VII.

In pursuance of said order, the said military commission convened at the time and place therein designated, all the members

being present except Captain Davis, whose order of detail had not reached him, and adjourned until the 6th of October, at 10 a. m. On the 6th of October said commissiom met, the same members being present, and adjourned until the 7th of the same October, at 10 a. m. On the said 7th of October said commission met, the same members being present. Carver was brought before them, and heard the order convening the commission read. The following charges and specifications were then read to said Carver, who was forthwith arraigned thereon:

Charges and specifications against Thomas J. Carver, citizen, and late bonded special agent for the Treasury Department in Choctaw County, Alabama.

Charge I.—Fraud.

Specification 1.—In this, that the said Thomas J. Carver, being the duly authorized special bonded agent of the Treasury Dept. for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, citizen of said county, to fraudulently purchase, at a price far below the real value, a certain amount of cotton, legitimately the property of the United States, he and they well knowing the same to be such, to wit, the amount of sixty-three bales of said Government cotton, purchased by said Thomas J. Carver, or his authorized partner, Israel Pickens, from W. J. Coleman, of said Choctow county, for which the sum of forty dollars per bale, or two thousand five hundred and twenty dollars, was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intend to defraud the Government of the United States, and to appropriate said property to his own use.

All this at the county of Choctaw, State of Alabama, on or about the month of August, A. D. 1865.

Specification 2nd.—In this, that the said Thomas J. Carver, being the duly authorized special bonded agent of the Treasury Department for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, a citizen of said county, to fraudulently purchase, at a price far below the real value, a certain amount of cotton legitimately the property of the United States, he and they well knowing the same to be such, to wit, the amount of ten bales of said Government cotton, purchased by said Thomas J. Carver, or his authorized agent, from J. A. Mills of said Choctaw County, for which the sum of forty dollars per bale, or four hundred dollars, was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate said property to his own use.

All this at the county of Choctaw, State of Alabama, on or about the month of September, 1865.

Specification 3rd.—In this, that the said Thomas J. Carver, being the duly authorized agent of the Treasury Department for the county of Choctaw, State of Alabama, did combine with one Israel Pickens,

a citizen of said county, to fraudulently purchase, at a price far below the real value, a certain amount of cotton legitimately the property of the United States, he and they well knowing the same to be such, to wit, the amount of thirteen bales of said Government cotton, purchased from John J. Williams, of said Choctaw County, by said Thomas J. Carver, or his authorized partner, Israel Pickens, for which the sum of forty dollars per bale, or five hundred and twenty dollars, was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate said property to his own use.

All this at the county of Choctaw, State of Alabama, on or about the month of September, 1865.

Specification 4th.—In this, that said Thomas J. Carver, being the duly authorized agent of the Treasury Department for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, a citizen of said county, to fraudulently purchase, at a price far below the real value, a certain amount of cotton legitimately the property of the United States, he and they well knowing the same to be such, to wit, the amount of five bales of said Government cotton, purchased by said Thomas J. Carver, through his authorized agent, F. F. Myer, from John Curry, of said Choctaw county, for which the sum of two hundred dollars was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate said property to his own use.

11 All this at the county of Choctaw, on or about the month of September, 1865.

Specification 5th.—In this, that said Thomas J. Carver, special agent of the Treasury Dept. for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, a citizen of said county, to fraudulently purchase, at a price far below the real value, a certain amount of cotton legitimately the property of the United States, he and they well knowing the same to be such, to-wit, the amount of ninety-three bales, purchased by F. J. Carver, or his authorized agent, from Col. D. Hopkins, of said Choctaw county, for which the sum of four thousand dollars was paid on account of T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate said property to his own use.

This at the county of Choctaw, on or about the month of September, 1865.

Specification 6th.—In this, that the said Thomas J. Carver, being the special agent of the Treasury Dept. for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, a citizen of said county, to fraudulently purchase a certain amount of cotton legitimately the property of the United States, he and they well knowing the same to be such, to-wit, the amount of twenty-five bales of said Government cotton, purchased by T. J. Carver, or his authorized

agent, Israel Pickens, for which the sum of one thousand dollars was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate said property to his own use.

This at the county of Choctaw, on or about the month of September, 1865.

Specification 7th.—In this, that said T. J. Carver, being special agent of the Treasury Dept. for the county of Choctaw, State of Alabama, did combine with one Israel Pickens, a citizen of said county, to fraudulently purchase various amounts of cotton legitimately the property of the United States, he and they well knowing the same to be such, to wit, eighteen bales of said Government cotton, purchased from B. G. Littlepage, of said county, for which the sum of eight hundred dollars was paid on account of said T. J. Carver, by his financial agent, C. N. Wilcox. This with the intent to defraud the Government of the United States, and to appropriate the same to his own use.

This at the county of Choctaw, State of Alabama, on or about the month of September, 1865.

Specification 8th.—In this that the said Thomas J. Carver, being the special agent for the Treasury Dept. for the collection of Government cotton in the county of Choctaw, State of Alabama, did order and instruct one A. Hill, warehouse-keeper at Tompkins Bluff, in said county, to erase the original marks upon three hundred and six bales of Government cotton, he well knowing the same to be such, and to mark said cotton with private marks, to wit, "C. C.," ⏀ "U. C.," "W. C.," and "L." This with the intent to appropriate said cotton to his own use, and to defraud the Government of the United States, All this at the county of Choctaw, State of Alabama, on or about the month of September, A. D. 1865.

HUNTER BROOKE,
B'v't Lieut. Col, Judge-Advocate.

VIII.

The said Carver pleaded to said charges and specifications as follows: To each specification not guilty; to the charge, not guilty; and further, denied the jurisdiction of the court to try him. The court sustained its jurisdiction, and thereupon Carver, by his counsel, proceeded to cross-examine the witnesses introduced by the prosecution, and to offer evidence on his own behalf. Argument was then had upon both sides, and on the 25th of October, 1865, the court made the following finding as to the said Carver:

Finding.

Of the 1st specification, excepting the word "bonded": guilty.
Of the 2d specification, excepting the word "bonded": guilty.
Of the 3d specification: guilty.

Of the 4th specification, excepting the words "through his authorized agent, F. F. Myer": guilty.

Of the 5th specification: guilty.

Of the 6th specification: guilty.

Of the 7th specification, excepting the initial letters "B. G." before the name "Littlepage": guilty.

Of the 8th specification: not guilty.

Of the charge: guilty.

12 And thereupon the said commission sentenced the said Carver as follows:

Sentence.

That he be fined in the sum of ninety thousand ($90,000) dollars, to be paid into the Treasury of the United States, and that he be confined at hard labor in such penitentiary as the commanding general may direct for the term of one year, and until such fine of ninety thousand ($90,000) shall be paid.

W. B. WOODS,
Brig Gen. U. S. Vol's & President.

HUNTER BROOKE,
B'v't L't. Col. and Judge-Advocate.

IX.

On the 27th day of the same October, the said proceedings, finding, and sentence of the commission were approved by the commanding general of the department, and the provost-marshal-general was ordered to see that the fine was duly paid; and the prisoner was ordered to be sent to Nashville for the execution of the imprisonment clause of his sentence.

X.

On the 7th day of November, 1865, the claimant paid $90,000 to Lieutenant-Colonel Brooke, the provost-marshal-general, or the deputies, in full satisfaction of said fine. On the 8th day of the same November the said Hunter, by direction of the major-general commanding the department, cashed out of the said funds so paid a check of the chief commissary of subsistence for the department for $10,000, and on the 20th of November forwarded the remainder of the money and the said check by express to the Adjutant-General of the Army at Washington, accompanied by the following letter:

HD. QRS. DEP'T ALABAMA,
OFFICE PROV. MAR. GEN.,
Nov. 20th, 1865.

Brigadier-Gen'l LORENZO THOMAS,
Adjutant-General U. S. A.

GENERAL: I have the honor to report that I have this day for-

warded to your office by Adams Express Co. the sum of $90,000—$80,000 in money and $10,000 in a check upon the depository at Washington, cashed by me under orders from Maj. Gen. C. R. Woods (enclosed). These funds are the proceeds of a fine levied by a military commission upon Thomas J. Carver, citizen, convicted of frauds in Government cotton, as per Gen. Orders Hd. Qrs. Dep't Alabama, No. 55. I enclose the express receipt.

I am, general, very respectfully, your ob't se'v't,

HUNTER BROOKE,
Bt. Lt. Col., P. G. M. & Judge-Advocate.

XI.

On the 8th of November, 1865, the following order was made, remitting a portion of the sentence of said Carver:

HEADQUARTERS DEPARTMENT OF ALABAMA,
Mobile, Ala., November 8th, 1865.

1. Thomas J. Carver (citizen) having paid the fine of ninety thousand dollars ($90,000) inflicted upon him by the military commission of which Brig. Gen. Wm. B. Woods was president, so much of General Orders No. 55, current series, from these headquarters, as sentences him to confinement at hard labor in such penitentiary as the commanding general may direct, for the term of one year, is hereby remitted. He will, therefore, be at once released from arrest.

By order of Major-General Chas. R. Woods.

A. RAMSEY NININGER, *A. A. G.*

Official.

A. RAMSEY NININGER,
Assistant Adjutant-General.

XII.

13 On the 10th day of the same November the commanding general of the department addressed the following letter to the Secretary of the Treasury:

HEADQUARTERS DEPARTMENT OF ALABAMA,
Mobile, Ala., Nov'b'r 10th, 1865.

Hon. HUGH MCCULLOUGH,
Secretary of the U. S. Treasury, Washington, D. C.:

SIR: Enclosed please find order promulgating sentence of military commission in the case of T. J. Carver, citizen, for frauds in the collection and shipment of Government cotton. The sentence covers the amount of cotton proven to have been taken and converted to private use.

Of the fine of $90,000 (ninety thousand dollars), $74,000 (seventy-four thousand dollars) have been paid in U. S. currency, and is now on deposit in the First National Bank of Mobile. For the remain-

ing $16,000 (sixteen thousand dollars), I have in custody 65 (sixty-five) bales of the finest cotton in Mobile, weighing from 500 (five hundred) to 600 (six hundred) pounds per bale, with the assurance if the cotton does not bring the $16,000 (sixteen thousand dollars) the remainder will be made good.

Upon the payment of the fine of $90,000 (ninety thousand dollars), and certain sworn statements of Mr. Carver, which opens up the whole system of frauds in this department, I have revoked the imprisonment clause of his sentence. Please find enclosed copy of orders.

Within two or three days I will be able to remit to the Treasury Department of the U. S., in the manner indicated by General Orders No. 58, dated Adjutant-General's Office, Washington, D. C., April 7th, 1865.

It has been customary to pay to citizens, giving information that would lead to the recovery of stolen Government cotton, from one-third to one-fourth of its value, depending upon the difficulty and amount of labor in procuring the necessary evidence.

In the case of Mr. T. J. Carver, which has required more labor, time, and expense than all the other cases of stolen Government cotton in this department, I am indebted to Mr. Wm. M. Moulton, citizen of Mobile, who gave the first information in this case, and who has for the last two months been busily engaged in working up the case, at his own expense hunting up the witnesses and bringing them to this city, that were necessary for the conviction of the prisoner.

I should, therefore, respectfully recommend that, so soon as the money is received in the Treasury of the U. S., you give an order to pay over to Mr. Wm. M. Moulton, of Mobile, one-fourth of the amount of the fine, as he has not received any remuneration for his services, nor have I any funds out of which I can pay him his actual expenses. It is my opinion that over 50,000 (fifty thousand) bales of Government cotton have been stolen in the State of Alabama, and shipped out of the State or moved from place to place, so that all traces of it have disappeared: and, unless the most liberal rewards are given for its detection, will be lost to the Government.

I have arrested Mr. T. C. A. Dexter, late special supervising agent, of the 9th agency, upon charges of defrauding the Government, and will probably be able to bring him before a military commission next Tuesday. From sworn evidence now in my hands, I think I will be able to show that many thousand bales of Government cotton have been diverted from their proper channels, or, in other words, fraudulent' taken from the Government by private parties and with the connivance and knowledge of Mr. Dexter.

It will be impossible for me to try all the parties against whom I can make cases of defrauding the Governm't. Can you suggest any means by which I may recover for the Government property without being obliged to bring the cases to trial? All the more important cases will be tried by military commission. There is no U. S. court established in this district.

I have been unable to get any clue to the frauds in this department until the trial of Mr. T. J. Carver, who has since come out and made developments that opens up the whole subject.

Most of the transactions of which I speak, and the largest frauds, took place in June and July, before I took command of the Department of Alabama.

I will state that I am acting under telegram orders from the President.

I am, sir, very respectfully, your obd't serv't,

CHAS. R. WOODS,

Br'v't-Major General, Commd'g Depm't of Alabama.

XIII.

By direction of the Secretary of War, the Adjutant-General,
14 on the 1st day of December, 1865, transmitted $90,000 as the amount collected from said Carver on account of said fine to the Treasurer of the United States in Washington, and on the same day the assistant treasurer gave certificates of deposit therefor in triplicate, which were on the second of the same December sent to the Adjutant-General by the Treasurer. Said certificates were in the following form:

TREASURY OF THE UNITED STATES,
December 1st, 1865.

I certify that Gen. E. D. Townsend, Assistant Adjutant-General, has this day deposited to the credit of Hon. F. E. Spinner, special agent, ninety thousand dollars, being amount of fine imposed upon Thomas J. Carver, late bonded agent of Treasury Department, U. S., for which I have signed triplicate receipts.

$90,000. F. BARRY,

Assistant Treasurer U. S.

XIV.

On the 2d January, 1866. the Treasurer addressed the following letter to the Secretary of the Treasury:

TREASURER OF THE UNITED STATES,
CASH DIVISION,
Washington, January 2d, 1866.

SIR: In reference to the communication of the Acting Assistant Secretary of War, under date of the 27th ultimo, relative to the payment into the Treasury of $90,000, amount of fine paid by T. J. Carver, in compliance with the sentence of a military commission at Mobile, Alabama, referred to me from your office for a report of the facts in the case, I have the honor to report that the amount was not paid into the Treasury, but was transferred on the 1st of December, by the Adjutant-General, to my credit as special

agent for receiving the proceeds of captured and abandoned property of the late so-called Confederate States.

Very respectfully,

F. E. SPINNER,
Treasurer U. S.

Hon. HUGH MCCULLOUGH,
Secretary of the Treasury.

XV.

The Secretary of the Treasury, in compliance with the recommendation in the letter of the commanding general of the department contained in the letter set forth in Finding XII, allowed the said Moulton, as informer, one-fourth of the said sum of $90,000, and on the 21st of February, 1866, addressed the following letter to General Spinner as special agent:

TREASURY DEPARTMENT, *February* 21, 1866.

F. E. SPINNER, Esq.,
U. S. Treasurer, Special Agent:

SIR: Application is made to me by Mr. Wm. M. Moulton, as informer, etc., for the fourth part of certain ninety thousand dollars ($90,000) recently turned over to you by Adjutant-General E. D. Townsend, as the proceeds of captured property.

It appears that the money in question was collected in the form of a fine from one Thomas J. Carver (as the value of certain cotton of which he had fraudulently deprived the United States), in accordance with the sentence passed by the military commission before which he was tried for the offense.

It is established to my satisfaction by the certificate of Major-General Charles R. Wood, by whose order the commission was convened, and of the judge-advocate who tried the case, that the information and evidence upon which the conviction was had and the money secured were furnished mainly or through the efforts and at the expense of Mr. Moulton, the claimant, as General
15 Woods recommends, also, that he "be paid one-fourth of the amount ($90,000) recovered, believing that he is fairly entitled to that amount, and that it is no more than a fair compensation for services rendered."

In view of these facts, and not deeming the amount asked unreasonable, I have decided to allow the claim. You are therefore hereby authorized and instructed to pay to Mr. Moulton, or his only empowered attorney, the one-fourth part of the amount received by you as above, taking his proper receipts therefor, and referring to this letter by date as your authority for the payment.

You will also take the necessary steps to cover the residue into the Treasury to the credit of the fund arising from captured and abandoned property, and report your action hereunder.

Respectfully,

H. MCCULLOCH,
Secretary of the Treasury

XVI.

General Spinner thereupon, on the 24th February, 1866, paid to the said Moulton the sum of $22,500, being the one-fourth part of the said sum of $90,000 so allowed by the Secretary of the Treasury. Said sum was paid by a draft on the Treasurer drawn by General Spinner as special agent, and the residue of the said sum, amounting to $67,500, was, on the 26th day of March, 1866, covered into the Treasury.

XVII.

On the 6th day of April, 1866, the general in command of said department addressed the following letter to the Secretary of the Treasury.

H'DQ'RS DEP'T ALABAMA,
Mobile, Ala., Ap. 6, 1866.

HON. HUGH MCCULLOUGH,
Secretary of the Treasury.

SIR: You may recollect the case of U. S. *vs.* Tho's J. Carver, tried in this department, in which the sum of $90,000 was collected as the equivalent of cotten proved to have been fraudulently appropriated by said Carver and his associates. His agency was Choctaw Co., in this State, and the commission demanded the recovery of all the cotten they could prove from that county. Since the trial this defendant, Carver, has been faithfully striving, through much persecution, both public and private, to make amends to the government *even after* his fine was paid. He is now a poor man and socially outlawed, but still proposes to make a full statement of the U. S. cotton transactions in that county provided the above sum of $90,000 will be allowed as a credit on the acc't. He guarantees the further recovery of from ten to fifteen thousand dollars to the government, but demands a fair interest, say one-third ($\frac{1}{3}$) for such recovery, which is to be made without suit or expense to the government.

Will you please direct me as to what course I shall pursue in the matter, and whether this credit will be allowed.

I am, sir, very respectfully, your ob'd't serv't,

CHA'S R. WOODS,
Bv't Maj.-Gen'l. Dept. Ala.

And the Secretary of the Treasury, on the 17th of the same April, made the following reply thereto:

TREASURY DEPARTMENT,
April 17th, 1866.

GENERAL: I have received your letter of the 6th inst. relative to the proposition of Mr. T. J. Carver, to further reimburse the govern-

ment in the matter of certain cottons of which it has been fraudulently deprived, either through his connivance of laches.

I am not certain that I clearly comprehend his plan, but, with the end suggested above in view, I will agree to consider the $90,000 collected from him in the form of a fine as a credit for that amount on any account the gover'ment may have against
16 him, growing out of his connection with the cottons in Choctaw County, and to allow him for his services, expenses, etc., in the premises, thirty-three and one-third (33⅓) per cent. of any farther sum he may recover and pay over for the benefit of the National Treasury on said account.

Your are hereby authorized to so stipulate with him on behalf of this department, and to receive from him any money so paid over, and, after returning him the one-third, as provided above, to forward the balance to my address.

For your services already rendered in the premises many obligations are due ; and for any farther sums secured through your efforts you will have the additional thanks of the gover'ment.

Very respectfully, yours, &c., H. McCULLOCH,
Secretary of the Treasury.

Maj. Gen. CHA'S R. WOODS,
Com'g, etc., etc., Mobile, Ala.

XVIII.

Thereupon the said Carver addressed to the Secretary of the Treasury the two following papers, one dated May 15 and one May 17, 1866 :

To the honorable HUGH McCULLOCH,
Secretary of the Treasury :

The petition of Thomas J. Carver, of Mobile, Alabama, respectfully represents that he was appointed local agent for the collection of government cotton in Coctaw county, Alabama, on or about the day of July, 1865, by Duff Greene, who held the appointment of Special Assistant Treasury agent himself from T. C. A. Dexter, who was at the head of the 9th agency ; that he entered on the discharge of his duties immediately, and *and* while thus engaged he was arrested and brought to trial in the city of Mobile, on a charge of buying government cotton, & was sentenced to pay a fine of $90,000. This fine was paid on or about the 8th of November, 1865, and petitioner was released from custody. Petitioner states that the facts connected with his said agency and his acts as such were not fully presented and brought to light on his trial, but subsequently this was done on the trial of T. C. A. Dexter. Now, notwithstanding petitioner has been fully discharged, he earnestly desires to put the government in possession of all the facts within his knowledge, so that justice may be done to it, and petitioner fully exonerated if, in in the opinion of the government, the facts are such as to

warrant it; and petitioner is now here and respectfully asks a hearing for that purpose. THO'S J CARVER.

WASHINGTON, *May* 15th, 1866.

To the Hon. HUGH MCCULLOCH,
Secretary of the Treasury:

Referring to an interview had with S. H. Kauffmann, esq'r, this morning, the undersigned begs more particularly to state, in addition to the statement already made, that he has, with great trouble, secured a list of the cotton subscribed to the so-called Confederate Government by the planters of Choctaw County, Alabama, the number of bales collected out of said county, and how disposed of; also a statement of accounts embracing 935 bales of said cotton, showing the value of said cotton, in September, 1865; the actual cost accruing upon said cotton, embracing the internal revenue tax the freight, storage, &c., showing the nett value of said cotton to be $94,243.75, from which is deducted the $90,000 imposed upon the undersigned as a "recovery of Government property," and leaving yet due on said cotton $4,243.75. That this statement does not include any expenses that was due to agents in getting out the cotton, and the undesigned submits that, being anxious to cause to be placed in the possession of the government these accounts, he requested Major-General Charles R. Woods to secure from the Secretary of the Treasury full power to make final settlement, but Gen'l Woods received, as the undersigned is advised, authority only to "receive money," which power did not appear fully to cover the case. Hence it appeared neceessary to make application direct to the Secretary of the Treasury.

Now the undersigned submits said statements and accounts for the purpose of asking the judgment and decision of the Secretary as to whether said balance of $4,243$\frac{75}{100}$ shall be collected, or whether, under all the circumstances, said balance shall be relinquished, and for the Secretary to make such order as in his judgment may be proper to be made.

17 The undersigned begs to state that the balance of $4,243$\frac{75}{100}$ is not due from him. He also states that this cotton was controlled by agent under whose orders he acted, and that he has been deprived of any and all commissions upon said cotton; and in addition, has suffered pecuniary losses, and would be glad, if in the judgment of the Secretary it is proper, to have an allowance made of $.

He begs further to state that he has been advised that, with proper diligence, he might secure a revocation of the acts of the military commission that imposed upon *him* a fine of $90,000, and if turned over to the civil tribunals it would operate to his relief. But, he thinks and hopes, by the method now proposed of causing settlements to be made, he will be able, through the interposition of Major-Gen'l Charles R. Woods, to secure such an order as will afford entire relief from the odium that has been fastened upon

him by corrupt men, and the real actors in these frauds upon the Government. All of which is most respectfully submitted.

THOS. J. CARVER.

WASHINGTON, 17*th May*, 1866.

Statement of cotton claimed by the United States, and which was charged as being under the control of Thos. J. Carver, as Treasury agent, and upon which said Carver was fined by a military commission, ordered by Major-General Charles R. Woods, in the sum of $90,000.

139	bales	weighing		53,662
40	"	"		12,236
128	"	"		53,712
214	"	"		36,914
236	"	"		107,054
43	"	"		17,016
33	"	"		13,282
102	"	"		44,452
935	Total			388,428

Quality from good ordinary to low mid'ling, average value 34c.; less for repacked, 2c.; is 388,428 p'ds, @ 32 . . 124,296,96

Upon which accrued the following expenses:

Hauling to landing, @ $3 p. bale	2,805	
Freight per flat-boat, @ 20$	18,700	
Internal revenue tax, @ 2c.	7,768 56	
Storage, 50c.	467 50	
Weighing, 2½	233 75	
Wharfage, 8c.	78 40	
		30,053 21
Nett am't		94,243 75
Amount paid as a fine		90,000 00
		4,243 75

XIX.

On the 21st of the same May the Secretary of the Treasury made the following reply to the communications set forth in Finding XVIII:

TREASURY DEPARTMENT, *May 21st*, 1866.

SIR: I have received your letter of the 15th, and also that of the 17th inst., enclosing a list of Government cotton located in Choctaw Co., Ala.; also a statement showing the receipts from and expenses on, certain nine hundred and thirty-five (935) bales thereof, in relation to which a fine of ninety thousand dollars (90,000)

was assessed upon and collected from you by a military commission, ordered by Maj. Gen. Wood, com'ng at Mobile, and asking that you be authorized to collect from the really guilty parties in the transaction the sum of four thousand two hundred and forty-three dollars and seventy-five cents ($4,243.75), that being the difference between the ninety thousand dollars (90,000) collected and the true net proceeds of the nine hundred and thirty-five (935) bales referred to above.

This matter has already been the subject of correspondence between the Department and Gen. Woods; and it appears to
18 me that, in my letter to him of the 17th of April last, I gave him all needful authority, so far as this Department is concerned, to compromise and close the matter; and in the absence of any further report from him on the subject, I do not think I can go beyond the arrangements contemplated therein.

I know nothing of the facts in detail showing your connection with the case, and do not, therefore, feel authorized to indicate any course to be pursued by Gen. Woods; but, if as I infer from your statement, he is satisfied that you were not actually guilty, and is disposed to give you a certificate to that effect, in addition to receiving the balance found due, and remunerating you for collecting it, such proceeding on his part will be entirely agreeable to me. Inasmuch, however, as he is familiar with all the facts, and fully appreciates the weight and responsibility of his official acts, I must leave the whole matter in his hands.

You can, if you wish, show this letter to Gen. Woods for his information as to my views in the premises.

Very respectfully,

H. McCULLOUGH,
Secretary of the Treasury.

THOMAS J. CARVER, Esq., of Ala.,
Washington, D. C.

XX.

On or about the 14th June, 1866, the claimant paid to the provost marshal of Alabama the said sum of $4,243.35, shown in the statement contained in Finding XVIII, and the said provost-marshal thereupon, by order of the Secretary of the Treasury, paid to the said Carver the sum of $1,414 45, being 33⅓ per cent. of the said sum of $4,243.35. Such payment was made and received in accordance with the agreement made by the Secretary of the Treasury in his letter of April 17 to General Woods set forth in Finding XVII, and referred to by the Secretary in his letter to the claimant of May 21, 1866, set forth in finding XIX.

Upon the foregoing facts the court decides as

CONCLUSIONS OF LAW.

1. As to No. 3612, that, for the reasons stated in the opinion of the court, the claimant's petition must be dismissed.

2. As to No. 6395, that, for the reasons stated in the opinion of the court, the claimant's petition must be dismissed.

VII. *Opinion of the Court.*

DAVIS J., delivered the opinion of the court.

These two suits are brought by the same claimant; were heard and submitted together; and have a common finding of facts.

On the 25th August, 1865, the President informed Major-General Thomas that he had reason to believe that frauds were being perpetrated in the collection of cotton in Alabama, and instructed him to make inquiries, and to deal in the most summary manner with all persons found guilty, whether connected with the Treasury or military.

On the 29th of August, 1865, the claimant was appointed a bonded agent for the collection of cotton in Choctaw County, Alabama. He entered upon his duties, but was suspended on the 16th of the next month, and a week later, on the 23d September, was arrested by military authority. On the 5th of the following October, by virtue of an order of the commanding general of the department, a military commission was convened, before which the claimant was arraigned, charged with fraud in combining with others to purchase government cotton at a price far below
19 its real value. He pleaded "not guilty" to the charges and specification and denied the jurisdiction of the court. On the 25th of October, after hearing and argument, he was found guilty, and was sentenced to pay a fine of $90,000, and to be imprisoned at hard labor for one year, and until the fine should be paid. On the 7th of November, 1865, he paid the fine; and on the 8th of the same month the remainder of the sentence was remitted. The money collected on the fine was sent to the Adjutant-General, in Washington, and by him passed over to the Secretary of the Treasury. The Secretary of the Treasury allowed one Moulton 25 per cent. upon it as a commission for his services in securing it, and the balance remained in the captured and abandoned property fund in the hands of General Spinner as special agent, until February 24, 1866, when it was covered into the Treasury.

The military authorities intended to fix this fine at a sum which should place in the Treasury the exact value of the cotton which had been fraudulently sequestered with the connivance of the claimant. It turned out, however, that cotton was still missing and unaccounted for to the amount of $4,243.75. Through the instrumentality of the claimant, after he had paid his fine, this amount also was recovered, and the claimant was allowed by the Secretary of the Treasury a commission of 33⅓ per cent upon it.

The first of these suits in date, No. 3612, is brought to recover a commission of 25 per cent. upon the $90,000, on the ground that it

represents cotton secured for the Treasury through the claimant. The second in date, through treated in argument as the first in importance, is brought to recover the fine of $90,000, which was, it alleges, collected without authority of law. The complainant demands the whole $90,000; but in his oral statement of his case the claimant's counsel laid claim as of right only to the $67,500 which actually went into the Treasury; and further said that his client, whatever his legal rights may be, regards himself as morally entitled only to the amount of the commissions which he claims in the other suit, and only desires judgment for that sum.

In the elaborate and able argument of the case, on both sides, many points were presented which become unimportant in the view which we take of the facts. It is due to counsel, however, that we should express our opinions on the points which they regard as essential. We shall do this as briefly as we can, consistently with the importance of the subject.

I. We think that, when the facts warrant it, a contract can be implied to refund money paid into the Treasury in order to satisfy a fine imposed by a military commission on a conviction void for want of jurisdiction. (*Devlin's Case*, 12 C. Cls. R., 266.)

II. Assuming that the money was illegally collected from the claimant, we think no action could be maintained against the government for its recovery while it was in the hands of the military authorities. The taking in such case would have been tortious, and could have entailed no liability on the part of the United States. (*Gibbon's Case*, 8 Wall., 269; *Langford's Case*, 101 U. S., 341.)

III. Nor could such an action have been maintained against the Government while the money was in the hands of General Spinner as special agent. His retention of the fund from the Treasury was illegal, and was subsequently condemned by Congress (15 Stat. L., 251), and payments from the same except on judgments of this court was forbidden (*Ib.*, 244.) The Constitution intrusts Congress with the custody of the public money, and with the power
20 to authorize obligations to be made to pay it out. The Treasurer is the official custodian for Congress, and unless money is in his custody, or in the hands of persons authorized by law to receive it on behalf of the United States, it is not in the possession of the United States. The fact that in the early cotton cases many judgments were rendered against this fund before it was covered into the Treasury does not affect our opinion upon this point. Those judgments were rendered on returns from the Treasury which indicated that the Secretary of the Treasury regarded the money as subject to judgments rendered by this court under the special act which required the court to adjudicate the cases, and directed the Secretary to pay such judgments as might be rendered against the fund. The proceedings under that special act have no bearing upon the general question discussed in this case.

IV. We are of opinion that the military commission had power to hear and determine the charges against the claimant.

It must be borne in mind that this commission was not a court-martial, and that, except in its forms for proceedings, it had little in common with one. A court-martial is one of the ordinary judicial institutions of the country, employed in time of peace as well as in time of war to administer justice according to the articles of war upon persons actually or constructively in the military or naval service. The claimant was a citizen, and the court took jurisdiction over him and his offenses by virtue of the war power vested in the commanding general by direction of the President, with the express or implied sanction of Congress.

Nor, on the other hand, was it an exercise of arbitrary power, to be excused by an overwhelming necessity in the presence of extreme danger caused by insurrection or invasion, and the insufficiency of ordinary law to secure public safety and protect life and property. It was the act of a military tribunal substituted in conquered territory by the conquerer for the ordinary courts of law, which had disappeared or been superseded.

Up to the outbreak of the war the constitutional rights of the citizen of a Southern State were identical with those enjoyed by persons domiciled in a Northern State. The proclamation of the President converted him into a public enemy, whose rights were defined by the laws of war. But when the actual conflict ceased, he was not at once restored to his full civil rights. Peace and the reign of civil law did not immedately follow the laying down of arms. The conqueror had first to decide many questions which, had the struggle been between independent powers, would have been the subject of negotiation and treaty. It is well known that there was great conflict of opinion as to the legal status of the conquered States, and that meanwhile and for some time after the surrender there was great need for the continued presence of an armed force to preserve order and society. This very case has given us glimpses of the disorganization—disbanded soldiers, camp followers, and disreputable adventurers stealing and plundering: and civil courts, civil officers, and the ordinary civil machinery for the protection of property and life stricken down by the sword.

The Supreme Court, in solving such of these problems as it had to solve, proceeded with caution. In *Anderson's Case* (9 Wall., 56), it held that the date of the President's proclamation of August 20, 1866, should "be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act." In the case of *The Protector* (12 Wall., 700), modifying this statement, it said:

> There were two proclamations declaring that the war had
> 21 closed; one issued on the 2d April, 1846, embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other issued on the 20th August, 1866, embracing the State of Texas. * * * We must take the dates of these proclamations in ascertaining * * * the close of the war in the States mentioned in them.

In a still later case that court showed its clear purpose to sustain beligerent authority up to the respective dates of the proclamations. It said that from the time when the States were declared by the President to be in insurrection—

The war became a well-defined territorial war. * * * The "condition of hostility" remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war. (*Hamilton* vs. *Dillon* 21 Wall, 95.)

This leaves no doubt that when the events took place which form the subject of the present controversy a state of war prevailed in the district in which they occurred as absolute, in its consequences, as that which existed before the surrender of the Confederate armies. What those consequences are upon a loyal citizen of the United States in the enemies' country, must be determined by the Constitution and laws of the United States as expounded by its court of highest authority. Elementary writers on public law have been cited in argument; but while the opinion of a publicist may have weight in measuring the rights and duties of the United States as a belligerent in their relations with their enemies, it ceases to be of authority in questions between them and their officers on one side and their citizens on the other, except so far as in accord with their Constitution and laws, and the decisions of their courts.

The first important action of the Supreme Court was in the *Prize Cases* (2 Black, 635), in which the legality of the blockade was drawn in question. It there said:

When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them to be belligerents, and the contest a war.

In *The Venice* (2 Wall., 274), the court thus stated one consequence of a state of war:

The rule which declares that war makes all the citizens or subjects of one, belligerent enemies of the government and of all the citizens or subjects of the other, applies equally to civil and to international wars. (*Prize Cases*, 2 Black, 666; concurred in by dissenting justices, *Id.*, 687–8.) Either belligerent may modify or limit its operations as to persons or territory of the other; but, in the absence of such modification or restriction, judicial tribunals cannot discriminate in its application.

In *The Grapeshot* (9 Wall., 129), the authority of a provisional court established in New Orleans after its capture was called in question. The court said:

It became the duty of the National Government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of per-

sons and property, and for the administration of justice. The duty of the National Government in this respect was no other than that which devolves upon the government of a regular belligerent, occupying, during the war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted, as such, with the direction of the military force by which the occupation was held.

In *Milligan's Case* (4 Wall., 127), the court say:

There are occasions when martial rule can be properly applied. If in foreign invasion or civil war the courts are
22 actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society, and, as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.* During the late rebellion it could have been enforced in Virginia where the national authority was overthrown, and the courts driven out.

In Mechanics and Traders' Bank *v.* Union Bank (22 Wall., 276), the court said:

It has been determined that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the national forces is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conqueror.

The learned judge who dissented based his dissent upon the absence of special authority from the President to establish the military court which had given the judgment; but in the present case it appears that there was a special order from the President to prosecute offenders like the claimant, and the objection therefore disappears.

In Leitensdorfer *v.* Webb (20 Howard 176), the court held that the President could extend a judicial system over and create courts with civil and criminal jurisdiction in conquered foreign territory, which would remain in force after the cessation of actual hostilities.

In Diekelman's Case (92 U. S. 520), the court say:

Martial law is the law of military necessity in the actual presence of war. It is administered by the General of the Army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed.

In Dow *v.* Johnson (100 U. S. 158), the court say that in case of conquest "the municipal laws, that is, such as affect private rights of persons and property, and provide for the punishment of crime, * * * are considered as continuing, unless suspended or superseded," which necessarily implies the right to suspend or supersede them; and the court refers with approval to tbe English case of

Elphinstone *v.* Bedreechund to show that this right continues after the cessation of actual hostilities, so as to affect acts done, "if not *flagrante* yet *nondum cessante bello*."

Thus it appears that the Supreme Court has settled several things which have a strong bearing upon the present case: 1st, that the right to administer justice by military courts acting under executive direction in the Southern States after conquest was the same in every respect that it would have been in a foreign country conquered by the United States; 2d, that that right extends both to the trial and determination of civil causes and to the trial and punishment of criminal offenders; 3d, that it is within the discretion of the conqueror either to exercise this power in accordance with the laws of the conquered country or to supersede the whole or any part of those laws at its discretion; 4th, that these rights, as has already been noted, survived until the war was terminated by the President's proclamation.

The question we are considering is now practically reduced to this: Whether a Treasury agent, appointed to collect and care for captured government property in a conquered country, who, during the time of war, whether foreign or civil, collusively permits that property to be secreted and carried away, commits an offense for which he can be tried, sentenced, and punished by a military court under executive direction in the absence of an act of Congress defining the offense.

To this question we can make but one answer—that he can. As the civil courts cannot interfere to prevent the conquest of enemies' territory, so they cannot impose conditions upon its military possession and government during the continuance of
23 war. They cannot curtail the war power of the United States. That power is defined in the cases we have cited, especially in Milligan's case, and in Diekelman's case and in Dow *v.* Johnson, in full accord with the law of nations. If an act of jurisdiction similar to that exercised on the claimant were performed on a citizen or subject of a foreign power, we cannot doubt that it would be justified by the political department of the Government and sustained in the courts, if the foreigner, like Diekelman, should have a status here. We can see no difference between the rights of the citizen and the alien in this respect. And further, the conquering power may supersede any or all the laws of the conquered. It would be most unreasonable to require prosecuting officers and the court, in the emergencies of war, to hunt up justifying statutes and laws and law authorities of the enemy to warrant prosecution and conviction. It would be equally unreasonable, considering our form of government and how far it relegates the punishment of offenses against property and life and society to State authorities, to permit no offense to be punished except those defined in a law of Congress. The exigencies of a state of war demand that the conqueror should possess the power of punishing offenses against life and against property and against the peace, and other like crimes

and misdemeanors, which have been the subject of criminal punishment in all times and among all nations. If he punishes needlessly or too severely the Executive will check and rebuke him, and if the Executive is a party to needless harshness or cruelty, or to any act whose aim or spirit is hostile to liberty, our institutions enable a free people to visit him with speedy condemnation.

V. It is immaterial whether the proceedings under which the claimant's money was taken from him can or cannot be justified in law. It is clear that the money subsequently passed into the Treasury with his consent for the purpose of making good the losses which the government had suffered through his frauds. Having consented to that legal application of the money, it is of no consequence whether it was originally acquired legally or illegally, and he cannot now, in his suit to recover the fine, set up that the original act was illegal. Even if he were not estopped from such proceeding, it is perfectly clear that no contract can be implied from all the facts to repay any part of the money. This point is sufficient to support the judgment which we shall order to be entered in the defendant's favor in the suit for the recovery of the fine, without regard to the jurisdiction of the court either to hear and determine the case or to impose the fine.

It appears from Finding XV that the money in question was collected in the form of a fine * * * as the value of certain cotton of which he [the claimant] had deprived the United States." After the payment of the fine the claimant submitted to the Secretary of the Treasury a statement, which will be found in Finding XVIII, of the whole amount of such cotton, showing an aggregate of 935 bales, of the value of $94,243.75. In this statement the amount of the fine, $90,000, was deducted from this sum as a "recovery of government property" to that extent, and he represented that there was yet "due on said cotton $4,243.75." He asked to have that balance relinquished to him. The decision of the Secretary on this request will be found in Findings XVII and XIX. He authorized the commander of the department to pay the claimant one-third of this balance for his services. It appears by Finding XX that the military authorities paid to the claimant the sum of $1,414.45, being one-third of the sum of $4,243.35, and that the payment was made and received in accordance with the directions of the Secretary of the
24 Treasury. In our opinion the claimant, by these proceedings, gave his assent to the application by the government of the money collected on the fine to the satisfaction of its losses by reason of the claimant's frauds. The government made the application in accordance with the claimant's assent and agreement. No cause of action was left to the claimant growing out of the acts of the military in Alabama. This view of the facts makes it unnecessary to consider the effect of the amendment to the Captured and abandoned Property Act made in 1864.

VI. As to the suit to recover commissions, the claimant earned

no commissions on the $90,000 worth of cotton. He attempted to defraud the government of this cotton, and the fraud was exposed and the money recovered through the instrumentality of Moulton, who was paid the usual commission for the recovery of so much cotton. The claimant has already received a commission of 33½ per cent. upon the remainder, which is all he is entitled to.

The judgment of the court in No. 3612 is that the petition be dismissed.

And in No. 6395 that the petition be dismissed.

VIII. *Final Judgment of the Court.*

At a court of claims held in the city of Washington on the 2d day of May, A. D. 1881, judgment was ordered to be entered herein as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge and decree that the petition of the claimant, Thomas J. Carver, be dismissed.

25 IX. *Application of Claimant for and Allowance of Appeal.*

From the judgment rendered in the above entitled cause on the second day of May, 1881, in favor of the defendants, the claimant, on the 11th day of June, 1881, makes application for and gives notice of an appeal to the Supreme Court of the United States.

S. S. HENKLE,
Atty for Claimant.

Filed June 11, 1881.
Allowed.

AT CHAMBERS.
C. D. DRAKE,
Chief Justice.

26 In the Court of Claims.

THOMAS J. CARVER
vs. } No. 6395.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusion of law thereon, of the opinion of the Court, of the final judgment of the Court, of the application of claimant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this eighth day of July, A. D. 1881.

[SEAL OF THE COURT.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

111-607

SUPREME COURT U.S.
FILED
JAMES H. MCKENNEY, CLERK

IN THE

Supreme Court United States.

OCTOBER TERM, 1888.

THOMAS J. CARVER,

VS.

THE UNITED STATES.

No. 338.

BRIEF FOR APPELLANT.

S. S. HENKLE,
Counsel for Appellant.

IN THE

Supreme Court United States.

THOMAS P. CARVER
vs.
THE UNITED STATES.
No. 338.

BRIEF OF S. S. HENKLE, COUNSEL FOR APPELLANT.

Statement of Case.

About the 1st of July, 1865 the plaintiff was appointed a sub-agent of the Treasury Department for the county of Choctaw and State of Alabama for the collection of cotton which had been sold by the planters to the Confederate Government.

About the 5th of August, 1865, a change was made by the regulations of the Treasury Department in the mode of collecting such cotton, and thereafter it was required to be collected by bonded officers of the Department. The first appointment of plaintiff thereby terminated.

On the 29th of August, 1865, he was appointed by Dexter, the supervising agent of the Treasury Department, agent for the county of Choctaw, and gave the required bond and entered on the discharge of his duties.

On the 16th of September, 1865, he was superceded in his office, and on the 23d of September he was arrested

by military authority. On the 4th of October, Major-General Woods, commanding the departme sued an order convening a military commission to t plaintiff.

Before this court he was arrainged and requir plead to the charge and specifications found on pp. and 8 of the record.

He first pleaded to the jurisdiction of the court, w being overruled, he pleaded "not guilty."

The court found him "guilty" of all the specifica save the 8th and "guilty" of the charge, and sente him to pay a fine of $90,000 and to be imprisoned i penitentiary for one year.

He paid the fine, and the commanding general remitted the imprisonment and discharged him custody.

The money was forwarded by the judge advocat the War Department, and $22,500 of it was paid b der of the Secretary of the Treasury, at the instan Gen. Woods to Wm. M. Moulton, who had instigate prosecution and furnished the evidence at his ow pense. The balance of the money, ($67,500,) in the indicated in the findings of the Court of Claims, f its way into the Treasury.

A suit was brought in the Court of Claims by plaintiff to recover commissions upon the amoun money paid by him as a *fine*.

Of course that suit was based upon the conce that the money paid by him was the product of the ton in his hands belonging to the Government, and t ing it as having been paid on account, and simply see commissions for the work done in collecting the co

Afterwards the counsel of Mr. Carver thought it to bring the suit set out in this record, claiming t

cover back the full amount paid by him. The two cases were heard together in the Court of Claims.

The decision of that court was adverse to plaintiff in both cases.

As the judgment which we ask from this court can be as well given upon this case as upon both, I did not think it necessary to burthen the record with the two cases, and therefore brought up but the one.

The questions made by the record are whether in October, 1865, at Mobile, in the State of Alabama, a military commission had jurisdiction to try the claimant, who was a bonded United States Treasury agent for the collection of captured and abandoned property, and in no way connected with the military service, for an alleged conspiracy to defraud the Government by purchasing from other persons cotton which legitimately belonged to the United States with the intention of converting it to his own use?

And whether he may maintain a suit against the States to recover back the money paid by him under compulsion as a fine imposed by said military commission, or so much thereof as found its way into the Treasury of the defendant, or any part of it which the court may find he was entitled to have out of the money.

Assignment of Errors.

The Court of Claims erred in deciding that the military commission had jurisdiction to try the appellant.

It erred in deciding that the judgment of the military court was a valid judgment, and not *void*.

It erred in deciding that the $90,000 was lawfully collected from the appellant as a *fine*.

It erred in deciding that Carver was estopped from recovering back the money taken from him by duress under a void judgment, because he had consented to the application of the money.

It erred in deciding that it was immaterial whether the proceeding under which the money was taken from Carver was legal or illegal, because he consented to the application of the money to make good the losses the government had sustained by reason of his frauds.

It erred in deciding that from all the facts no contract can be implied to repay any part of the money.

Upon the facts and the law the appellant should have had judgment for at least so much of the money taken from him and covered into the treasury, as would have compensated him for his services and expenses in collecting the cotton.

Argument.

Who and what was Carver?

The Court of Claims finds that Carver was, in 1865, a citizen of the United States, and had, for many years, been resident in Mobile, in the State of Alabama.

2d Findings, p. 4.

They also find that he was a "bonded officer" of the Treasury Department of the United States.

4 Find., p. 4.

The doctrine was early established by this court that

the insurrection was a territorial war, and that all the inhabitants of the territory within the rebel lines were public enemies, possessing the rights and charged with the responsibilities of belligerents.

While the city of Mobile was in the possession of the rebel forces, Carver may have been an enemy and a belligerent, but whatever his *status* may have been while the war was flagrant, in October 1865, he was a *loyal* citizen of the United States and an officer of the Treasury Department.

He was not, therefore, amenable to any military subjugation as a *belligerent*, but was clothed with all the constitutional and legal rights of the most loyal citizen. Such was the *status* of Carver.

What was the condition of Alabama in October, 1865?

On the 10th of May, 1865, the President issued his proclamation against insurgent cruisers, in which he says:

"And whereas armed resistance to the authority of the Government in the said insurrectionary States may be regarded as *entirely at an end*, and the persons by whom that resistance, as well as the operations of insurgent cruisers was directed, are fugitives or captives," &c.

I cite this to show that on the 10th of May, 1865, the President proclaimed that in the insurrectionary States armed resistance to the Government was at an end. The war was over.

On the 22d of May, 1865, the President issued his proclamation, raising the blockade of all the ports save those in Texas.

He proclaims that from and after the 1st day of July the ports of the United States shall be open to foreign commerce. It also disallows to all persons trading or attempting to trade in any of the ports of the United

States in violation of the laws thereof all pretence of belligerent rights and privileges, and gives notice that all such persons will be dealt with as pirates. It also removes all restrictions upon trade in the territory east of the Mississippi river, save those relating to contraband of war, to the reservation of the United States, to property purchased in the territory of an enemy, and to the 25 per cent. upon the purchases of cotton.

"All provisions of the internal revenue law will be carried into effect under the proper officers."

I cite this to show that on the 22d of May, 1865, the President raised the blockade which had sealed up the Southern ports, and invited the commerce of the world to enter them.

That he also at the same time removed the interdiction upon the trade between the loyal and the insurrectionary States east of the Mississippi river, and gave notice that trading in any of the ports of the United States in violation of the laws of the United States upon the pretence of belligerent rights would be dealt with as piracy, and that he directed to be put in operation the internal revenue laws of the United States.

U. S. Stats.-at-L., 757.

On the 29th of May, 1865, he issued a proclamation of general amnesty to all who had participated in the rebellion (with certain exceptions,) with restoration to all rights of property, except as to slaves and except in cases of confiscation of property, where legal proceedings under the laws of the United States have been instituted upon condition of taking the prescribed oath.

13 Stats., 758.

I cite this to show that the people who had been in insurrection were rehabilitated as citizens of the United

States, with all their rights and privileges. That they were no longer to be treated as rebels or enemies or belligerents. That they were again under the old flag, and entitled to the protection of the Constitution and laws of the United States, to which they were also amenable.

On the 21st of June, 1865, he issued another proclamation.

The preamble recites that the armed forces of the rebellion have now been almost entirely overcome. He appoints Lewis E. Parsons provisional governor of Alabama, and directs him to convene a convention at the earliest practicable period for the purpose of altering or amending the Constitution, with a view to restoring the State to its constitutional relations to the Federal Government, and directs—

1st. That the military commander of the department and all officers and persons in the military and naval service aid and assist the provisional governor in carrying into effect this proclamation, and that they be enjoined to abstain from in any way hindering, impeding or discouraging the *loyal* people from the organization of a State government as herein authorized.

2d. The Secretary of State was directed to proceed to put in force all laws of the United States, the administration whereof belonged to the State Department.

3d. That the Secretary of the Treasury proceed to nominate for appointment assessors of taxes and collectors of customs and internal revenue, and such other officers of the Treasury Department as are authorized by law, and to put in execution the revenue laws of the United States.

4th. That the Postmaster General proceed to establish

post offices and post routes, and put into execution the postal laws of the United States.

5th. That the district judge for the judicial district in which Alabama is included proceed to hold court within said State in accordance with the provisions of the act of Congress. "The Attorney-General will instruct the proper officers to *libel* and bring to judgment, confiscation and sale property subject to confiscation, and enforce the administration of justice within said *State in all matters within the cognizance and jurisdiction of the Federal courts.*"

6th. That the Secretary of the Navy take possession of all public property belonging to the Navy Department within said geographical limits, and put in operation all acts of Congress in relation to naval officers having application to said State.

7th. That the Secretary of the Interior put in force the laws relating to the Interior Department applicable to the geographical limits aforesaid.

13 Stats., 767.

Similar proclamations were issued as to the other States which had been in rebellion, some shortly before and some shortly after the foregoing.

I cite this proclamation to show that as early as the 21st of June, 1865, the President directed that the whole machinery of the Federal Government be put in operation in Alabama just as it was in the loyal States.

And particularly to show that the United States District Court was *open* and *ready for the trial of crimes and offences against the United States*, and the Attorney-General was particularly enjoined to instruct the proper officers *to libel* and bring to judgment and sale property subject

to confiscation, *and enforce the administration of justice within said State in all matters within the cognizance and jurisdiction of the Federal courts.*

Then, in October, 1865, there was not an enemy in arms against the Government, within our entire domain —the war was over. The authority of the Government was everywhere recognized and respected. In the State of Alabama, and I believe in all the other States, the laws pertaining to every Department and Federal Government were in full operation, and the United States Courts were open.

Such was the condition of things in Alabama in October, 1865, where the plaintiffs was tried by the Military Court.

Had that court jurisdiction over the case ?

We say that it had not, and that its judgment was simply *void.*

In this country in time of peace the citizens is under no circumstances amenable to trial by a Military Court.

In time of war a citizen may be tried by court-martial for violation of the 45th and 46th articles of war, in giving aid and comfort to the enemy, or under section 1,343 of the revised statutes for acting as a spy.

Rev. Stats., 234 and 242.

These are the only cases in this country where a citizen may be tried by court-martial.

Ives Military Law, 63.

The court by which the plaintiffs was tried, was a military commission.

What is a military commission ?

Ives at p. 280 defines it to be "a tribunal composed of military officers, deriving its jurisdiction (in this country) from the express or implied will of Congress, and having power to try offenders against the laws of war."

We will search in vain for any act of Congress in which is found any either express or implied authority for the trial of one in no way connected with the military by a military commission save as already indicated under the 45th and 46th articles of the war for giving aid and comfort to the enemy and under 1,345 Sec. of Rev. Stats., for acting as a spy.

I should except the act of March, 2, 1867, one of the reconstruction acts, to which I shall have occasion to refer again. But this act was not in force in 1865, and could not therefore affect a court acting at that time.

There was then no act of Congress which by express provision or by implication, authorized this court.

A definition based upon the usage of our armies during the Mexican war and the late war of the Rebellion is found in the "Digest of Opinions of the Judge Advocate General," by Winthrop, pp. 324–5.

"By a practice dating from 1847, and renewed and firmly established during the late war, military commissions have become adopted as authorized tribunals in this country *in time of war*. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial cannot be extended to include offences which, in war, would go unpunished in the absence of a provisional forum for the trial of the offenders. This authority is derived from the law of war, though in some cases their powers have been added to by statute."

This author derives the power from the *laws of war*,

except where it has been supplemented by statute. He makes it simply a criminal war court for the trial of such offences as a court-martial cannot try, and of offences which would go unpunished but for a provisional forum. and he seems to think that the fact that offenders may escape punishment is sufficient authority for the establishment of this extraordinary court.

Ives, p. 34, says:

"Courts-martial derive their jurisdiction in this country from statutes of Congress, under its constitutional power 'to make rules for the regulation and government of the land forces,' Congress has established a military discipline, defined military offences, provided courts for their trial and punishment, prescribed the jurisdiction and practice of these courts and the mode of executing their sentences; in fact, has done everything that is necessary for a proper administration of justice in the army."

"It was early settled by the Supreme Court that the Circuit and District Courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by the statute, and the reasoning in these cases is equally applicable to courts-martial."

The power, then, is not derived from Congress, and if it exists at all, it must be derived from the law of war, as asserted by Winthrop.

LAW OF WAR.

"The law of war is, in brief, the law of military government and authority as exercised in time of war, foreign or civil. Its usual field is the territory of a conquered country in the occupation of a hostile army. It is sometimes extended, though generally in a milder form, to localities under 'martial law.' It is properly a

part of the law of nations, though its application may be materially varied by the circumstances of the country or the people brought under its sway." (Winthrop. p. 303.

This court in Milligan's case, 4 Wall., at p. 127, settled when, and the circumstances under which, *martial rule* in this country might be lawful:

"It follows from what has been said on this subject, that there are occasions when martial rule can be properly applied. If in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown *to preserve the safety of the army and society*; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued *after the courts are re-instated it is a gross usurpation of power*. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of *actual war*, because during the late rebellion it could have been enforced in Virginia, where the National authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State, when in another it would be 'mere lawless violence.'"

In this extract from the great opinion by Justice Davis, we have authoritatively settled the time when, and the circumstances under which, martial rule is allowed in this country, and if resorted to under any other it is "mere lawless violence."

DID THE TIME AND CIRCUMSTANCES UNDER WHICH THIS COURT WAS HELD MEET THE REQUIRED CONDITIONS TO MAKE IT LAWFUL?

True, Alabama had been in rebellion; true, this court has repeatedly held that the insurrection became a territorial war, and that all the citizens of the territory in rebellion became public enemies and belligerents.

True, that while the war actually lasted the authority and the courts of the United States were overturned. While this condition continued a court such as that which we are considering, might lawfully have sat in a case where it had jurisdiction of the offense and the offender.

But in October, 1865, that condition had ceased to exist. There was not an enemy in arms in the State of Alabama, and probably not in the whole South. The war was over and the authority of the United States was everywhere recognized. By order of the President all the machinery of the Federal Government had been put in full operation. The United States Courts were again open, and justice was again administered in her own forums.

As we have seen as early as the 10th of May, the President had declared to the world "that armed resistance to the authority of the Government in the said insurrection States, may be regarded as virtually at an end."

And on the 21st of June he ordered the heads of all the Departments to put in operation to the conquered States the full machinery of the Federal Government, and ordered the United States judge to proceed to hold his courts.

The Court of Claims say on p. 21, "the claimant was a citizen, and the court took jurisdiction over him and

his offense by virtue of the *war power* vested in the commanding general by *direction of the President*, with the express or implied sanction of Congress.

This is not of the findings but in the opinion, which we are at liberty to controvert if we can.

We deny that this proceeding had any sanction of Congress or implied from Congress.

And we deny that the President directed it.

The court doubtless refers to the dispatch from the President to Gen. Thomas, set out in the first finding on page 3:

"WASHINGTON, *August 14th, 1865.*

"To MAJ. GENL. THOMAS, Nashville:

"I have been advised that innumerable frauds are being practiced by persons assuming to be treasury agents in various portions of Alabama, in the collecting of cotton pretended to belong to the Confederate Government. I also understand they are connected with the commander of the post of Montgomery. I hope you will appoint some efficient officer under your command to proceed and examine and ascertain the facts, and if any parties shall be found, whether connected with treasury or military, that you will deal with them in the most summary manner, and *report the names of persons engaged in such transactions and each case.*"

There is no intimation, much less command, to proceed to try any offender by military commission. The General is directed to report the names of persons engaged in each transaction and each case, which looks as though the President contemplated handing offenders over to the courts for prosecution.

There is no implication that the President ordered this court. On the contrary, the implication is that he intended to have offenders tried by the court, for he had,

more than three months before ordered the courts to be opened and to proceed to the trial of offenders against the laws, and he ordered the Attorney-General "to instruct the proper officers to *libel* and bring to judgment, confiscation and sale, the property subject to confiscation, *and enforce the administration of justice within said State in all matters within the cognizance and jurisdiction of the Federal courts.*

But if the President had *expressly* ordered it, that would not justify it. The President is no more above the law than the humblest citizen.

Vide Milligan case.

The President had himself brought about a condition of things which made the legality of this court impossible

Again the Court of Claims says, on p. 21:

"Nor, on the other hand, was it an exercise of arbitrary power to be excused by an overwhelming necessity in the presence of extreme danger, caused by insurrection or invasion, and the insufficiency of the ordinary law to secure public safety and protect life and property. It was the act of a military tribunal substituted in conquered territory by the conqueror for the ordinary courts of law, which had disappeared or been suspended."

The court concedes that this proceeding cannot be justified upon the ground which this court, in the Milligan case, said would alone justify it, but finds its justification in that it was a military tribunal substituted in a conquered territory by the conqueror for the ordinary courts of law, which had disappeared or been suspended.

It is conceded as an abstract proposition that by the laws of war, when a belligerent power is in military oc-

cupation of conquered territory he has the right to govern it.

"We therefore do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war as established by the usage of the world and confirmed by the writings of publicists and the decisions of courts—in fine, from the laws of nations.

Halleck's International Law and Law of War, p. 736.

"The government established over an enemy's territory during its military occupation many exercise all the powers given by law to the conqueror over the conquered, and is subject to all the restrictions that that code imposes. It is of little consequence whether such government be called a military or civil government, its character is the same in either case; it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, or the rest of the world, these laws alone determine the legality or illegality of its acts." Ibid.

Says the same author on the same page:

"But when the conquest is made complete, in *whatsoever* mode, the right to govern the acquired territory follows as the inevitable consequence of the right of acquisition, and the character, form, and powers of the government established over such conquered territory are determined by the constitution and laws of the state which acquires or with which it is incorporated."

The right of Government of course involves the right to preserve the public order and protect life and property.

"The trial and punishment of the guilty parties may be left to the ordinary courts, and authorities of the

country, or they may be referred to special tribunals organized for that purpose by the Government of military occupation."

Halleck, 783.

These are conceded principles of the laws of nations applicable where independent nations are at war. The court of claims held them applicable to this case.

After Gen. Kearney took possession of New Mexico, he, under the sanction of this Government, established a territorial Government and a code, and a system of courts for the trial of both criminal and civil cases, And in the case Lietensderfer *et al*, *vs.* Webb, 20 How., 176, this court held that these courts were lawfully constituted. It was contended that with the termination of the belligerant attitude of the parties and the close of the contest every institution of New Mexico, which had been overthrown revived and was re-established. But this court said the territory never was released by the conquerer nor restored to its original allegiance, but possession was permanently retained by the United States, under the settled purpose never to relinquish it and that therefore the provisional Government and institutions stood until Congress provided a Government by legislation.

By the English law when a country has been conquered by her arms, it immediately becomes a dominion of the King and the inhabitants, *ipso facto* become subjects of the King.

"But a different rule holds in the United States. The peculiar character of our Govern ment, and the powers vested in it by the federal constitution, have given rise to rules somewhat peculiar and anomalous with respect to the Government of conquered territory. The President, in the exercise of his constitutional power as commander in chief of the army,

and the military officers under his authority may, when war has been declared, seize the enemies possessions and establish a Government and laws for the territory so seized and occupied. Such territory is subject to the sovereignty and dominion of the United States, so soon as the enemy is driven out or submits to our arms. But neither the President, nor his officers, can extend the limits, or enlarge the boundaries of the union. This can only be done by Congress. As the institutions and laws of the United States do not extend beyond the limits before assigned to them by the legislative power, the inhabitants of a conquered territory, during its military occupation by the United States can claim none of the rights and privileges established by such laws." "The conquered territory is under the sovereignty and authority of the union; but it is not a part of the United States; nor does it cease to be a foreign country, or its inhabitants cease to be aliens, in the sense in which these words are used in our laws. They are to be governed by martial law as regulated and limited by public law. But while such territory forms no part of the Union, and its inhabitants have none of the rights and immunities and privileges of citizens of the United States, under the Federal constitution and laws; nevertheless other nations are bound to regard the conquered territory while in our possession as territory of the United States, and to respect it as such, and to regard its inhabitants as under our protection and government; 'for by the laws and usages of nations,' says Chief Justice Taney, 'conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, have a right to enter it without permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regards all other nations it is a part of the United States, and belongs to them as exclusively as the territory included in our established boundaries.'"

Halleck, pp. 784-5.

The doctrine contained in this citation is fully sustained in the opinion of Chief Justice Taney in the case

of Fleming et al. *vs.* Page, 9 How., 603; see also Cross *vs.* Harrison, 18 How., 181.

I concede, therefore, that foreign territory or territory which had never been constituted a part of the domain of the United States, which has been conquered by her arms, and is held by permanent military occupation even after the war is over, may be governed by a provisional government set up by the military commander with the authority of the President, and that justice may be administered by tribunals appointed in the same way, and for the reason that while in this transition state and before the territory has become either by treaty or by act of Congress a part of our domain, the inhabitants are not citizens of the United States, and our constitution and laws are not extended over the territory, and hence the military commander governs by the same authority by which he holds—the *laws of war*. And the provisional government may continue until a government is provided by Congress, and this to save the people from anarchy because they have no other government.

But this principle does not apply to any part of the territory of the United States, which had been in insurrection against the Federal Government. The suppression of the rebellion did not abrogate the laws of the State.

"The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by temporary right of military occupation. He nevertheless has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones. Such changes are, however, in general, only of a temporary character, and

end with the government which made them. On the confirmation of the conquest by treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest;" "hence the ordinary jurisdiction of the conquering State does not extend to actions, whether civil or military, originating in the occupied territory."

Halleck, pp. 771–2.

If these principles are applicable to territory conquered by one independent nation from another, how much more are they applicable to our war, which was waged not for conquest or acquisition, but simply to put down an insurrection?

By our conquest we acquired nothing that did not belong to us before. We did not have to provide a government and laws for our new acquisition. We simply brought back our rebellious people to submission to the laws which before prevailed. True, some changes were required to be made in the constitutions and laws of the States to adapt them to the altered conditions caused by the war, and to the new constitutional amendments. And the President took charge of administration of the local governments by the appointment of provisional governors, but the municipal laws remained intact, and justice civil and criminal, could be fully administered by the State courts. The Federal Government never attempted to interfere with it.

When the insurrection was subdued it required no legislation by Congress to put in force the constitution and laws of the United States. While the armed resistance to the Federal authority continued, the Federal laws could not be enforced, but the moment the resistance ceased, the constitution and laws of the United States were immediately regnant.

Why does not this case come within the principle of the Milligan case?

Troops were stationed in Indiana at the time of that trial. Indiana belonged to a military department. The war was flagrant. The offense with which Milligan was charged, says this court, was "an *enormous crime*." He belonged to a "secret organization armed to oppose the laws, and sought by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." The court held that because Indiana was not then the theatre of active military operations, and the war not prevailing there so that the courts were closed; in short, because he might be tried by the regularly constituted courts, although his offense was an *enormous* political crime, and against the laws of war; his seizure and trial by the military was little else "than lawless violence."

At the time of the trial of Carver there were troops in Alabama, but there was no war there, nor anywhere else within our border. There was no plotting to introduce the enemies of the country into peaceful communities, there to light the torch of war or to overthrow the power of the United States.

Carver was a loyal citizen and a bonded officer of the United States, and the offense with which he was charged had no relation to the war or to the laws of war. The war was all over. The authority of the Government was supreme and the courts were open.

I know this Court has repeatedly held that the President or the commanding general may set up courts in conquered territory held by military occupation.

General Kearney made a code of civil and criminal

practice for New Mexico while he held it by military occupation. That was foreign territory conquered and permanently held by our arms, and afterwards incorporated into our domain.

Leitsenderfer *vs.* Webb, 20 How., 177.
Cross et al., *vs.* Harrison, 16 How., 181.

In the case of the "Grapeshot," 9 Wall., 129, this Court held that the President had the power to establish a provisional court for Louisiana during the war.

The Chief Justice in stating the case says: "Louisiana had become involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, however, the national authority had been partially re-established in the state, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city, and such other portions of the state as had submitted to the general Government. The question was whether this court was lawfully instituted.

The court says that the rebellion, when it assumed the character of a civil war, was attended by the general incidents of a general war.

"The object of the National Government, indeed, was neither conquest or subjugation, but the overthrow of the insurgent organization, the suppression of the insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National Government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

"The duty of the National Government was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of

another belligerent. It was a military duty to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military forces by which the occupation was held."

The court then says what that duty is when the territory occupied is foreign, was decided in Leitensderfer and Webb, and the same reasons apply to the establishment of a provisional court in Louisiana.

The ground then upon which the exercise of the power was upheld, was the duty to provide for the security of persons and property and for the administration of justice.

And this obligation arose from the fact that the civil authority and the civil courts were overthrown. Upon the restoration of civil authority in the State the provisional court, limited in duration according to the proclamation, ceased to exist.

In Handlin *vs.* Wickliffe, 12 Wall., 174, during the war and while Gen. Shepley was acting as military governor of Louisiana, he appointed Handlin as judge of the 3d district court of New Orleans. Subsequently, while the war was still flagrant, a constitution was adopted for the State under military orders by a portion of the citizens and Hahn was elected governor, and was also appointed military governor in place of Shepley. Hahn removed Handlin. After the war Handlin sued out a mandamus on the auditor for his salary as judge, denying the right of Hahn to remove him. Judgment was against him in the State court and he appealed to this court. Says the Chief Justice:

"It is too clear for argument that the appointment of the relator as judge was purely military, authorized only by the necessities of military occupa-

tion, and was subject to revocation whenever in the judgment of the military governor, revocation should become necessary or expedient. The adoption of the constitution during the war under military orders, and the election of Hahn as governor, did not affect the military occupation in the judgment of the national authorities, for Hahn was appointed military governor by the President. If the situation was not changed, Hahn as military governor had the same right as his predecessor to re-voke the appointment of judge. If it was changed and the civil constitution of the State was in full operation, independent of military control, the authority derived from the appointment of military governor designated by the President *ceased of necessity*."

In the case of Mechanic's, etc., Bank, *vs.* Union Bank, 22 Wall., 276, the question came before this court as to power of the military commander at New Orleans, while it was in the military occupation of our troops, to appoint a court with civil jurisdiction, and the court, upon the authority of the Grapeshot case and Leitensderfer *vs.* Webb, held that the appointment was not a violation of the Constitution. The court says:

"In view of these decisions it is not to be questioned that the Constitution did not prohibit the creation of military authority by courts for the trial of civil causes during the civil war in conquered portions of the insurgent states."

Two things may be assumed as settled by these decisions:

1st. That by the laws of war the President or military commander, while holding foreign territory conquered by our arms, before it is incorporated into our national domain and provided by Congress with a government, may establish courts with civil and criminal jurisdiction.

2d. That the same power may be exercised in portions

of our own territory while held in military subjection during a civil war.

But the conditions in the latter case are—

1st. That the war must be flagrant.

2d. That the civil courts must be closed and overthrown.

3d. That it must be necessary for the protection of life and property and for the administration of justice. The order of President Lincoln creating the provisional court at New Orleans, signed by himself and Mr. Seward, clearly sets forth the grounds which, in the opinion of these great lawyers and patriots, justified and demanded it. (See note to Mechanics' Bank *vs.* Union Bank, 22 Wall., 279.)

Says the executive order:

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the state in military occupation, and it being indispensably necessary that there should be some judicial tribunal existing there capable of administering justice, I have therefore thought proper to appoint a judge, and do hereby constitute a provisional court."

He then proceeds to appoint a judge, defines the jurisdiction of the court, directs that as far as possible it conform to the practice customary in the United States courts, provides for the machinery of the court, the salaries of the judge and officers and fixes the duration.

"These appointments are to continue during the pleasure of the President, *not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana.*"

It is placed distinctly upon the ground of the overthrow of all civil authority and the entire absence of civil courts, State or national, and the absolute necessity for some tribunal to administer justice. But it is carefully limited in its duration to the continuance of the necessity of which it was begotten, "not extending beyond the military occupation of the city of New Orleans or the restoration of civil authority in that city and the State of Louisiana."

The Court of Claims quotes to sustain its position from the case of the Mechanics' and Traders' Bank *vs.* The Union Bank, *supra*:

> "It has been determined that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the national forces is precisely the same as that which exists where foreign territory has been conquered and is occupied by the conquerer."

I do not deny the doctrine contained in the extract, but I do deny its applicability to this case. In that case the court had been set up right in the midst of flagrant war. All civil authority, according to President Lincoln, state and national, and the courts of both jurisdictions, had been overthrown, and there was absolute necessity to prevent anarchy, for a tribunal to administer justice. And under these circumstances by the laws of war the commanding general might set up a court to administer justice, whether the place held by temporary military occupation was a part of our own domain or foreign conquered territory, and there is no conflict between this and the Miligan case.

To sustain its view the Court of Claims also cites the case of United States, *vs.* Diekelman, 92 U. S. 520. Diekelman, a Prussian, sued the United States in the Court of

Claims for damages for the detention of the ship "Essex" by the military authorities of the United States at New Orleans in the month of Sept., 1862. The case came to this court on appeal by the United States. In the course of the opinion the Chief Justice, Waite, graphically describes the situation at New Orleans at that time. "At that date the blockade was not removed, but only relaxed in the interest of commerce. The war still remained paramount and commercial intercourse subordinate only."

"The law by which the city and port were governed, was martial law." "The place had been wrested from the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was in fact a garrisoned city, held as an out post of the Union Army, and closely besieged by land." "Citizens were governed by martial law." "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown, Gen. Butler in command was the military ruler. His will was law; and necessarily so."

Certainly New Orleans at that time fulfilled all the conditions which authorized the appointment of a military court upon the doctrine of the Milligan case.

I maintain that wherever the rebellion was completely subdued and the Government held the territory by complete and permanent military occupation; the people who had during the war been enemies and belligerants, were restored to their rights and responsibilities of National Citizenship.

In the Venice, 2 Wall. at 277, this Court after commenting on the President's proclamation, issued under the 5th

Sec. of the act of July 13, 1861, providing for the collection of duties &c., says:

"This legislative and executive action related indeed, mainly to trade and intercourse between the inhabitants of loyal, and the inhabitants of insurgent parts of the country; but by excepting districts occupied and controlled by the national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say not illusive, not imperfect, not transient; but substantial, complete and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not indeed restore peace, or in all respects former relations; but it replaces rebel by national authority, and recognizes to some extent, the conditions and responsibilities of *National Citizenship*."

"It is true that the general exception from the prohibition of commercial intercourse which has just been mentioned, was cancelled and revoked by the President's proclamation of the 31st of March, 1863, and instead of it, a particular exception made of West Virginia," &c.

"But this revocation merely brought all parts of the insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861. It affected in no respect the general principles of protection to rights and property under temporary government established after the restoration of the national authority.

"The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule the rights of persons and of property have been in general respected and enforced"

The court then refers to the letter of Admiral Farragut to the rebel mayor of New Orleans and the proclamation of Gen. Butler, both of which promised security to persons and property.

"Both were a manifestation of a general purpose which

seeks the re-establishment of the national authority *and the ultimate restoration of states and citizens to their national relations, under better forms and firmer guaranties, without any views of subjugation or conquest.*"

The doctrine of this case I understand to be that where our arms had subdued the rebellion and held the territory by military occupation, the territory was not to be treated as enemies' territory in our occupation, but as our own recovered territory, nor were the citizens to be considered or treated as enemies and belligerents, but as citizens of the United States restored to their rights and subject to their responsibilities as citizens.

See also Desmare, 93 U. S., at 611; Woodson *vs.* Fleet, 2 Abbott, U. S., 15.

The same doctrine is maintained by Mr. Justice Blatchford in the case of Britton *vs.* Butler, 9 Blatch, 456. Britton sued Gen. Butler in assumpsit on the money counts. The causes of action are alleged to have accrued in New Orleans, September 1, 1862. Gen. Butler filed special pleas in which he sets up that he was a Major-General, commanding, by assignment of the President, the military department of the Gulf; that as such he took possession of New Orleans and the adjacent portion of Louisiana, and held the same by the armed forces of the United States; that he had proclaimed martial law; that he was acting under the orders of the President and in virtue of certain acts of Congress, &c.; that on the 1st of September his pickets captured a person furtively trying to make his way from the territory of the enemy into the city of New Orleans; that they took from him two drafts, which they found concealed upon his person, drawn by firms in Natchez, which was then enemy's country, upon firms in New Orleans; that under the orders of

the President, he collected the drafts and turned the money into the Treasury, &c.

The court, on p. 461, says:

"They (the drafts) were not siezed while passing between loyal and disloyal territory. They were in *loyal* territory."

And on p. 462 the court says:

"The case then as one of seizure is one of seizure in *loyal territory* of the moneys of persons in such territory not alleged to have been enemy of the United States."

On p. 463, referring to the acts of Congress which provide for confiscation:

"All these acts provide for a seizure only with a view to judicial proceedings. Even if the seizure in this case was lawful, no judicial proceedings were set up, but only a turning over of the money to the Treasury of the United States."

The court, on p. 465, refers to the case of The Venice, and says:

"Under the act of July 13, 1861, and the proclamation of the President of August 16, 1861, the city of New Orleans, after its actual, substantial, complete and permanent military occupation and control by the United States, in May, 1862, could not be regarded as in actual insurrection nor could its inhabitants be regarded as subject in most respects to treatment as enemies; and that such military occupation and control drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government. The plea set up no necessity for the seizure of the money and no justification therefor under these principles."

These cases establish that the civil war was waged on the part of the Government with "the purpose of the

re-establishment of the National authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any views of *subjugation or conquest.*" And that wherever any part of the territory was subdued, and was held by actual, substantial, complete, and permanent military occupation, the territory was *restored to National authority, and was in contemplation of law loyal territory,* and the inhabitants were no longer to be regarded as enemies and belligerents, but were entitled to the protection and subject to the responsibility of national citizenship.

If these principles were applicable to New Orleans in 1872, when the city was held in subjection only by the strong hand, and the war raged all around it, how much more are they applicable to Alabama in October, 1865, when the war was over everywhere, and the Federal Government had rehabitated the State with all the institutions of peace, and the military were merely performing police duty.

Whenever, therefore, any part of the rebel territory had been subdued and was held by military occupation, it became the duty of the President or his representative, the military commander, to establish tribunals for the administration of justice during the continuance of the war or till the restoration of civil authority or the opening of the civil courts. And the power to do this was not derived from the Constitution, but is purely a war power.

We have seen how carefully Mr. Lincoln limited it to the continuance of the war or the restoration of civil authority, and based it upon the fact that all civil authority and the courts had been overthrown, thus placing

it where this court placed it in the Milligan case, and that is the only solid foundation upon which it can rest.

The Court of Claims held that the right of military domination continued until the close of the war, and that the war did not close until April 2, 1866, by the President's proclamation of that date. And it is true that this court in the case of the Protectors, 12 Wall., at 702, for the purpose of construing a statute of limitations, adopted that date for the close of the war as to those States named in the proclamation of that date.

The theory of the Court of Claims is, that a state of war prevailed until the President's proclamation of peace, April, 1866, and that until then the laws of war prevailed, and the will of the commanding officer was the supreme law ; and this, notwithstanding this court has settled that so soon as the military occupation became complete, substantial, and permanent, the territory was again loyal territory, and the inhabitants loyal citizens ; and notwithstanding the President had the month before clothed the State in the complete paraphanalia of peace, and had started the courts and ordered all cases in which they had jurisdiction to be prosecuted therein. I insist then, that in October, 1865, neither the commanding general nor the President had the power to constitute a military court in Alabama, for the trial of a loyal citizen in no way connected with the army nor charged with any violation of the laws of war.

The military court for the trial of a citizen has its origin in *necessity*, because the civil courts are closed by the prevalence of *actual flagrant* war ; and this alone can justify it ; and when the necessity has passed, the power must cease also.

The constitution provides that :

"The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior," &c. Art. 3, sec. 1.

These military courts are outside of the constitution, and derive their origin from the laws of war, and whenever the constitution and laws are dominant they cannot exist. The civil courts and these military courts for trial of citizens cannot co-exist.

Congress passed "An act to provide for the more effectual government of the rebel States, approved March 2d, 1867," which provides that the rebel States be divided in military districts and made subject to military authority. To each district a commander was to be assigned by the President.

The 3d section provides that it should be the duty of the commander to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish or cause to be punished all disturbers of the public peace, and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders; or when, in his judgment, it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority, with the exercise of military authority under the act, shall be null and void.

Under this statute one McArdle was arrested and held for trial by the military authorities in Mississippi. He was charged with disturbance of the public peace; of inciting insurrection, disorder, and violence; of libel and of impeding reconstruction.

He sued out a writ of habeas corpus from the Circuit

Court; upon hearing, that court ordered him to be remanded to the custody of the military, from which order he appealed to this court. Pending the appeal and before the final hearing here, Congress passed an act repealing the law allowing the appeal to this court from the Circuit Court in habeas corpus cases, and thereby defeated an adjudication by this court upon the constitutionality of the act.

Ex-parte McArdle, 6 Wall. 318; Ibid 7, 506.

Congress did not intend that the law should go through the judicial crucible. It was contrary to the whole spirit and genius of our institutions, and had no warrant even in the minority opinion in the Milligan case.

In October, 1865, the laws of war had no application to Alabama.

It never ceased to be a State of the Union, nor her citizens to be citizens of the United States.

Texas *vs.* White, 7 Wall., at 726.

When the insurrection was quelled, the laws of the United States pervaded the State just as though the rebellion had not been. It required no treaty of peace to adjust the relations of the former belligerants. The inhabitants were again citizens of the United States, amenable to the laws of the United States, and entitled to their protection just as though they had never been in rebellion. It required no proclamation of the President that peace is restored.

The Court of Claims proceeded upon the theory that Alabama, in Oct., 1865, was enemy's country, and that the inhabitants were enemies and belligerents; that the laws of the United States were not in force there, and that the only law which prevailed was the will of the Military Commander. Says that Court on p. 24:

"We can see no difference between the rights of the citizen and the alien in this respect. And further, the conquering power may supersede any or all laws of the conquered. It would be most unreasonable to require prosecuting officers and the Court, in the emergencies of war, to hunt up justifying statutes and laws and law authorities of *the enemy* to warrant prosecution and conviction. It would be equally unreasonable, considering our form of government and how far it relegates the punishment of offenses against property and life and society to State authorities, to permit no offense to be punished except those defined in an act of Congress."

In other words, that a Military Commander of the United States, in loyal territory, when there is nowhere an enemy in arms, where the civil authority of the Government is fully recognized and established, and all the departments of the Government are in full operation, and all the civil courts are open, may, on his own motion, or by the direction of the President, seize a loyal citizen in no way connected with the military service, nor charged with any violation of the laws of war, or of any offense involving the safety of the army or of society, and try him by a military commission, and that it is not necessary that the offense be known either to the State or Federal law—that under such circumstances the military court may *make* the offense and punish it.

The United States Court in Alabama did not wait until the final suppression of the rebellion, (April 2, 1866,) but had been giving and enforcing judgments in civil and criminal cases for ten months before that time.

And so had the United States and State courts all over the South.

It is a part of the history of the time that Dexter, the general supervising agent of the Treasury Department, was arrested by the same military authorities in Alabama

shortly after Carver's trial, and he was ordered to be discharged from custody by Judge Busted, United States district judge.

See certified opinion of Judge Busted.

Offences of which Military Commission has Jurisdiction.

"The two classes of offences are—

"1. Violations of the laws of war.

"2. Civil crimes, which, because the civil authority if superceded by the military and the civil courts are closed or their functions suspended, cannot be taken cognizance of in the ordinary tribunals. In other words, the military commission besides exercising, under the laws of war, a jurisdiction of offences peculiar to the laws of war, may act also as a substitute for the time for the regular criminal judicature of the state or district."

Winthrop, 328.

The offence of Carver, if he committed any, was against the laws of the United States and not against the State.

Assuming that this military commission sat as the substitute for the United States court, it could only have tried Carver for an offence created by act of Congress and which would have been cognizable in a United States court.

There are no common-law offences against the United States, and the United States courts have no jurisdiction to try offences except such as are made so by act of Congress.

1 Bish. Criminal Law, 5th ed., sec. 199;

U. S. *vs.* Hudson, 7 Cr., 32;

U. S. *vs.* Coolidge, 1 Wheat., 145;

U. S. *vs.* Ravara, 2 Dall., 297;

U. S. *vs.* Worrell, Ibid. 386;

Cross *vs.* Harrison, 16 How., 164.

The Crime For Which Carver Was Tried.

The charge was *fraud.*

There were eight specifications.

The first seven charge that Carver combined with Israel Pickens to fraudulently purchase cotton which legitimately belonged to the United States, from other parties, with the intent to defraud the United States, and to appropriate to his own use, &c.

It is not averred that he did appropriate the cotton to his own use, or that he did in fact defraud the government.

To constitute a *crime* the *act* must accompany the *intent*; and it requires *both* to make the offense.

The offense intended to be charged is simply a *conspiracy* to defraud the Government.

Conspiracies for unlawful or fraudulent purposes were indictable at common law as misdemeanors. But this was an offense against the United States, if an offense at all.

There was no such offense known to the criminal code of the United States in 1865, as a conspiracy to defraud the Government.

Nor any crime known as *fraud.*

As we have seen, when the military courts, from *necessity* in the absence of the civil courts, undertook to administer the criminal law against a citizen, where the offense charged is not against the laws of war, it must be for an offense known to and defined by the civil law.

The military court had no power to try Carver, because the offense with which he was charged was not an offense against the laws of war, and was not known to the statute laws of the United States.

THE COLLECTION AND CUSTODY OF CAPTURED AND ABANDONED PROPERTY BELONGED EXCLUSIVELY TO THE TREASURY AGENTS.

The military authorities had nothing to do with captured or abandoned property, except to aid the treasury agents when called upon to do so.

In case property of this kind came into their hands, they were required to turn it over to the treasury agent, and any officer or private who failed or neglected to do so was liable to punishment.

See section 6 of an act to provide for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts of the United States, approved March 12, 1863. Also section 10 of "an act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection." Approved July 2, 1864.

Treasury Regs., p. 15.

See also Gen. Orders No. 88, War Dept., Mar. 31, 1863. p. 15.

Also orders of Sec'y of War, dated Sept. 11, 1863, p. 88, Treasury Regs.

The constitution provides that the privilege of the writ of habeas corpus shall not be suspended, except when in cases of rebellion or invasion the public safety may require it.

Congress judging that the exigency had arisen which justified it under the Constitution, on March 3, 1863, authorized the President, "whenever in his judgment the public safety may require it, to suspend the habeas

corpus in any case throughout the United States during the rebellion."

See 12th Stats. at Large, 755.

Sept. 15, 1863, the President issued his proclamation suspending the writ in the cases in which, in his judgment, the public safety required it.

13 Stats. at L., 734.

The persons as to whom the proclamation suspends the writ, are "prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted, or mustered or enlisted in, or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war, or the rules or regulations prescribed for the military or naval service by authority of the President of the United States, or for resisting the draft, or for any other offense against the military or naval service."

The offenders, as to whom the writ of *habeas corpus* was suspended, were all in some way connected either with the military or naval service, and it could not have been contemplated that any others should be tried by military courts, save where the war was flagrant and the civil courts were closed.

The enumerated list contained the classes of cases which the "public safety" required to be summarily dealt with. Carver's offence was not in this list.

The Court of Claims, on p. 25, says that it is immaterial whether the proceeding under which the claimant's money was taken from him can or cannot be justified in law as the money subsequently with his consent passed into the treasury to make good the losses the Government had sustained by his frauds.

The record shows that the money was extorted from him on the 7th of November, 1865, (see Findg. 10, p. 9,) and it was covered into the treasury March 26th, 1866. (See Findg. 16, p. 14.) The letter of Gen. Woods to the Secretary of the Treasury, proposing on behalf of Carver that the money taken from him as a fine be credited to him on his account, is dated April 6th, 1866. (See Findg. 17, p. 14.) On the 15th of May, 1866, Carver addressed a petition to the Secretary of the Treasury, and on the 17th of the same month a letter. (See Findg 18, pp. 15, 16 and 17.) So that the findings show that the money had been covered into the treasury before any application was made to the Secretary by Carver. The money did not pass into the treasury by *his consent*. Neither did the Government lose a dollar by his frauds. The specifications upon which he was tried did not charge any *actual* loss, but a *conspiracy* to defraud.

Again, the opinion says: "Having consented to the application of the money, it is of no consequence whether it was originally acquired legally or illegally, and he cannot now set up that the original act was illegal."

There is no finding that Carver consented to the application of the money, and certainly the record shows no such consent, unless there be implied consent that the money should be credited on his account. In his letter to the Secretary, on p. 16, referring to himself in the third person, he says: "He also states that this cotton was controlled by an agent, under whose orders he acted, and that he has been deprived of any and all commissions upon said cotton, and in addition has suffered pecuniary losses, and would be glad if, in the judgment of the Secretary it is proper, to have an allowance made of $——."

"He begs further to state that he has been advised that with proper diligence he might secure a revocation of the acts of the military commission that imposed upon him a fine of $90,000, and if turned over to the civil tribunals it would operate to his relief. But he thinks and hopes by the methods now proposed of causing settlements to be made he will be able, through the interposition of Major-General Charles R. Woods, to secure such an order as will afford entire relief from the odium that has been fastened upon him by corrupt men, and the real actors in these frauds upon the government." But the record does not show that he ever secured such an order, and he never did in fact.

The correspondence between Carver and the Secretary shows that he sought by humble petition to obtain justice, but that he never did. (See Carver's letter, p. 16, and Secretary's reply.(p. 7 8 and 11.)

The Secretary believed him guilty because the military court had found him guilty, and he persistently refused to do him justice.

So I deny the allegation of the Court of Claims that Carver consented to the "application of the money," and I insist that it is of the very greatest importance whether it was "acquired legally or illegally." If it was acquired *legally* there is the end of it, and it *illegally* Carver is entitled to recover it back, or so much of it as the court shall find he was legally or equitably entitled to, just as though the fine had never been imposed.

In Gen. Woods' letter to the Secretary, on p. 14, he says: "Since the trial of this defendant, Carver has been faithfully striving to make amends to the Government *even after* his fine was paid. He is now a poor man and socially outlawed, but still proposes to make a full statement of the United States cotton transactions in that

county provided the above sum of $90,000 will be allowed as a credit on the account. He guarantees the further recovery of from ten to fifteen thousand dollars to the Government, but demands a fair interest, say one-third, for such recovery, which is to be made without suit or expense to the Government."

The Secretary, on p. 15, replies: *I will agree to consider the $90,000 collected from him in the form of a fine, as a credit for that amount on any account the Government may have against him growing out of his connection with the cottons in Choctaw county,* and will allow him for his services, expenses, etc., in the premises 33⅓ per cent. for any further sums he may recover and pay over for the benefit of the national Treasury on said account."

If Gen. Wood is to be considered as representing Carver in this correspondence, then there was an agreement between him and the Secretary by which this $90,000 was to be credited to Carver upon any account the Government might have against him. This is the best possible aspect of the case for the Government.

The Government then derives no advantage from the fact that it has forcibly taken the money from Carver without settlement, and it should be treated as though the money was still in Carver's hands. What would he be entitled to retain out of this $90,000 before he paid it over?

Certainly he is entitled to his commissions, and the Secretary has fixed that at 33⅓ per cent. And he ought to be also entitled to his extra expenses.

In the 5th finding the Court of Claims finds that Carver had paid the planters upwards of $25,000 of his own money to get them to bring in six hundred bales of cotton.

So that he was actually out of pocket upwards of

$25,000 in expenses to get in the cotton. And that court thought it would be just and right for the Government of the United States to take from this man this large sum of money and refuse to give him any compensation for his time and labor, and hazard to his life, and social outlawry, because the military court found that he intended to appropriate the cotton to his own use.

The Court of Claims, of course, bases its opinion that Carver intended to misappropriate the cotton upon the record of the military court. If that was *void* the findings and opinion based upon it cannot be considered, and Carver stands without any imputation upon his integrity. There was no other evidence against him than that contained in the military record, and he offered no evidence save as to his character.

Carver denies any fraudulent intent on his part in his letter to the Secretary, on p. 16 rec., and the court returns this letter as a part of its findings of facts. There is nothing to contradict it in the record save the finding of the military court.

After he had paid his fine he did what was in his power to aid in exposing the frauds which had been imputed to him, and I think it is fairly to be inferred from General Wood's letters, that if not satisfied of his entire innocence of fraudulent intent, he thought at all events that the money collected from him as a fine should be credited on his account. See letters on pp. 12, 14.

But even supposing Carver had *intended* to defraud the Government, he didn't succeed in doing it. And the fraudulent intent would be no defence against his claim for services in collecting it.

The Court of Claims does say in 5th finding, "about 600 bales of cotton were collected and appropriated by

him, for which he paid the planters upwards of $25,000, and none of which was ever turned over to the defendant."

But that is taken from the military record, and the evidence shows that it was all accounted for in money. See statement, p. 17.

If the military court had no jurisdiction, the judgment was void, and the claimant is entitled to recover back the money paid upon its sentence.

Dynes *vs.* Hoover, 20 How. 65.

It is conceded that the Government is not liable for the torts of its officers.

Gibbons *vs.* U. S., 8 Wall, 269.

Langford *vs.* 101, U. S. 341.

The money was paid by Carver under duress, and he is entitled to recover back the amount that actually went into the treasury, or so much thereof as the court may find in equity and justice he was entitled to.

Devlin's case, 12, C. C., 266.

Newdigate *vs.* Davy Ld. Raymond, 742.

Mills vs. Martin, 19 John. R. pp. 22-26.

Frye *vs.* Lockwood, 4 Cow. 456.

AS TO THE STATUTE OF LIMITATIONS.

The liability of the Government is founded solely upon its *possession* of the claimants' money without right to hold it.

The liability arose not when the money was paid to the military officers, nor when it was received by the Adjutant General of the War Department, nor when it was turned over by him to Gen. Spinner, who held it on *special deposit* in the Treasury as "special agent," but it arose when the money was actually covered into the Treasury of the United States, and not until then.

It was at no time the money of the United States. It was not lawfully held by any officer, military or civil, through whose hands it passed for the benefit of the United States. No one of the officers handling it had any right or authority by law to hold it for the United States, or to charge, or make the United States accountable for it.

If it had been kept and appropriated to his own use by Col. Brooke, or Gen. Townsend, or Gen. Spinner, the Government would not have been responsible for it.

While in the possession of either of these gentlemen, Carver might have maintained an individual action against him for "money had and received," and a plea that he held the money as an officer of the United States would not have protected him from judgment.

Before the money was covered into the Treasury, the officers through whose hands it passed might have made any disposition of it without rendering the Government liable for it. In fact Gen. Spinner did pay Moulton $22,500 of this money on the order of the Secretary of the Treasury, and I concede the Government is not liable to Carver for this amount.

In Byrum's case, 8 C. C., 440, this Court held that under the abandoned and captured property act, the Government is only liable for what went into the Treasury, and is not responsible for the malfeasance of its officers and agents.

In U. S. *vs.* Ross 92 U. S., 281, the Supreme Court held the money must be shown to be in the Treasury. It is not sufficient that it was in the hands of the Treasury agent.

S. S. HENKLE,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

CARVER
v.
THE UNITED STATES. } No. 338.

111-606

BRIEF FOR THE UNITED STATES.

This is a claim for $90,000, brought in December, 1871. It is based upon money received by the United States under the order of a military court sitting in Alabama in 1865; that money having been the proceeds of a fine imposed upon the claimant for fraudulent dealings *as a cotton agent* in that State during 1865, and covers (or nearly) the amount so alleged to have been fraudulently embezzled.

I adopt the opinion of the learned court below (Record, pp. 19, &c.) as a full and satisfactory statement of the grounds of its judgment dismissing the petition; and, therefore, of the reasons for which that judgment should be affirmed.

S. F. PHILLIPS,
Solicitor-General.